



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 424 of 2014

IN THE MATTER OF BASIC EDUCATION ACT 2013 NO. 14 OF 2013

AND

IN THE MATTER OF ELECTION OF OFFICIALS OF THE KENYA NATIONAL PARENTS ASSOCIATION, COUNTY PARENTS ASSOCIATIONS, SUB-COUNTY PARENTS ASSOCIATIONS AND SCHOOL PARENTS ASSOCIATIONS

AND IN THE MATTER OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE CONSTITUTION OF THE KENYA NATIONAL PARENTS ASSOCIATION

AND IN THE MATTER OF UNLAWFUL INTERFERENCE IN THE ELECTIONS OF OFFICIALS OF NATIONAL PARENTS ASSOCIATION, COUNTY PARENTS ASSOCIATION, SUB-COUNTY PARENTS ASSOCIATION, AND SCHOOL PARENTS ASSOCIATIONS

AND

IN THE OF SCHOOLS PARENTS ASSOCIATION LEVIES AND OTHER CHARGES BEING UNLAWFUL COLLECTED BY PARENTS TEACHERS ASSOCIATIONS

AND IN THE MATTER TRANSPARENCY, ACCOUNTABILITY, TAKING ACCOUNTS AND GOOD GOVERNANCE IN THE COLLECTION, MANAGEMENT AND UTILIZATION OF FUNDS UNLAWFULLY COLLECTED BY PARENTS TEACHERS ASSOCIATIONS

AND

IN THE MATTER OF THE ROLE OF SCHOOL PARENTS ASSOCIATIONS UNDER THE GUIDANCE, SUPERVISION AND CONTROL OF THE NATIONAL PARENTS ASSOCIATION IN THE COLLECTION, MANAGEMENT AND UTILIZATION OF FUNDS COLLECTED FROM PARENTS IN ALL PUBLIC PRIMARY AND SECONDARY SCHOOLS IN KENYA

AND

IN THE MATTER OF THE USURPING OF THE MANDATE AND FUNCTIONS OF THE KENYA NATIONAL PARENTS ASSOCIATION BY THE CABINET SECRETARY MINISTRY OF EDUCATION SCIENCE AND TECHNOLOGY AND PRINCIPAL SECRETARY-STATE DEPARTMENT OF EDUCATION BY INTRODUCING OPERATIONAL GUIDELINES FOR

PARENTS ASSOCIATIONS IN BREACH OF THE PROVISIONS OF THE BASIC EDUCATION ACT 2013 AND CONSTITUTION OF KENYA NATIONAL PARENTS ASSOCIATION

AND

IN THE MATTER OF UNDERMINING THE ROLE AND MANDATE OF THE KENYA NATIONAL PARENTS ASSOCIATION BY THE CABINET SECRETARY-MINISTRY OF EDUCATION SCIENCE AND TECHNOLOGY AND THE PRINCIPAL SECRETARY-STATE DEPARTMENT OF EDUCATION BY PROMOTING, ABBETING AND CONDONING THE ILLEGAL COLLECTIONS CARRIED OUT BY PARENTS TEACHERS ASSOCIATIONS IN PUBLIC PRIMARY AND SECONDARY SCHOOLS IN KENYA

AND

IN THE MATTER OF DISCRIMINATION AND UNEQUAL TREATMENT BY THE CABINET SECRETARY – MINISTRY OF EDUCATION SCIENCE AND TECHNOLOGY AND THE PRINCIPAL SECRETARY-STATE DEPARTMENT OF EDUCATION MINISTRY OF EDUCATION SCIENCE AND TECHNOLOGY IN THE APPOINTMENTS OF MEMBERS TO THE COUNTY EDUCATION BOARDS

BETWEEN

THE KENYA NATIONAL PARENTS ASSOCIATION

THROUGH THE SECRETARY GENERAL- MUSAU NDUNDA.....PETITIONER

VERSUS

**THE CABINET SECRETARY-MINISTRY OF EDUCATION SCIENCE & TECHNOLOGY
PROF. JACOB KAIMENYI.....1ST RESPONDENT**

THE PRINCIPAL SECRETARY- STATE DEPARTMENT OF EDUCATION

DR. BELIO KIPSANG.....2ND RESPONDENT

THE ATTORNEY GENERAL.....3RD RESPONDENT

R U L I N G

1. By a Notice of Motion dated 25th August, 2014, the ex parte applicant herein, **The Kenya National Parents Association**, seeks the following orders:

1. **THAT pending the hearing and determination of this application, the honourable court do issue an order of temporary injunction to restrain the 1st and 2nd Respondents either by themselves, their servants, agents or Persons acting under their authority from suspending, nullifying, presiding over, preparing to conduct, constituting parents association committees at the school level and or in any way whatsoever from interfering with Applicant's right to conduct and supervise elections of the School Parents Associations, sub-county Parents Association, County Parents Associations and National Parents Association**

2. **THAT pending the hearing and determination of this suit, the honourable court do issue an order of temporary injunction to restrain the 1st and 2nd Respondents either by themselves, their Servants, Agents or Persons acting under their authority from suspending, nullifying, presiding over, preparing to conduct, constituting parents**

association committees at the school level and or in any way whatsoever from interfering with Applicant's right to Conduct and Supervise elections of the School Parents Associations, Sub-County Parents Association, County Parents Associations and National Parents Association.

3. THAT pending the hearing and determination of this application, the honourable court do issue an order of Temporary Injunction to restrain the 1st and 2nd Respondents either by themselves, their Servants, Agents or Persons acting under their authority from collecting and or receiving funds from parents or pupils without the approval of the Applicant

4. THAT pending the hearing and determination of this Suit, the honourable court do issue an order of Temporary Injunction to restrain the 1st and 2nd Respondents either by themselves, their Servants, Agents or Persons acting under their authority from collecting and or receiving funds from parents or pupils without the Applicants approval.

5. THAT pending the hearing and determination of this application, the honourable court do issue an order of temporary injunction to restrain the 1st and 2nd Respondents either by themselves, their servants, agents or persons acting under their authority from imposing and charging and levy on parents and pupils in public schools without the approval of the Applicant.

6. THAT pending the hearing and determination of this suit, the honourable court do issue an order of temporary injunction to restrain the 1st and 2nd Respondents either by themselves, their servants, agents or persons acting under their authority from imposing and charging any levy on parents and public in public schools without the approval of the Applicant.

7. THAT the honourable court does issue an order of mandatory injunction to compel the 1st and 2nd Respondents to freeze all the "Parents Teachers Association Bank Accounts" and transfer the funds therein to "School Parents Association Bank Accounts" to be opened, managed and supervised by the Applicant

8. THAT pending the hearing and determination of this application the honourable court do issue an order of temporary injunction to restrain the 1st and 2nd Respondents either by themselves, their servants, agents or persons acting under their authority from interfering with the Applicants opening, managing and supervising Bank Accounts of the School Parents Associations.

9. THAT pending the hearing and determination of this suit and honourable court do issue an order of temporary injunction to restrain the 1st and 2nd Respondents either by themselves, their servants, agents or persons acting under their authority from interfering with the Applicants opening, managing and supervising Bank Accounts of the School Parents Associations.

10. THAT the honourable court do issue an order of Mandamus to compel the 1st and 2nd Respondents to appoint the Petitioners nominees to the County Education Boards in compliance with Section 20(h) of the Basic Education Act 2013.

11. THAT cost be borne by the Respondents.

2. This ruling is, however concerned only with 2 of the said Motion.

3. The application was supported by an affidavit sworn by **Musau Ndunda**, the Secretary General as

- well as the Executive Director of the Applicant on 25th August, 2014.
4. According to the applicant, on or around the month of May 2013 and pursuant to the authority granted by the 1st Respondent on 21st February 2013, he and other officials started conducting elections for office bearers of parents Associations and they have been conducting elections at the School Level, Sub County Level, County Level which elections are scheduled to culminate into National Elections in the month of December 2014.
 5. However, on or around May 2014, he came to learn of the existence of a document developed by the 1st and 2nd Respondent entitled “Operational Guidelines for Parents Associations for Pre-Primary, Primary and Secondary Schools” which guidelines had been emailed to all County Directors of Education Countrywide to circulate to all schools within their areas of Jurisdiction. The said operational guidelines of the Parents Associations developed by the 1st and 2nd Respondents provide guidelines for holding elections at the school level which is in conflict with the provisions guiding elections of Parents Associations as stipulated in the applicant’s Constitution and it undermines its powers, functions and mandate to conduct elections of its members at the school level Countrywide.
 6. On or about the month of June 2012, the deponent came to learn of the existence of an Email circulated to all County Directors of Education across the Country by **Mrs Margaret Thiongo** – the Director of Field Services of the 1st Respondent which Email made reference to the Operational Guidelines for the Parents Associations of pre-primary, primary and secondary schools” and called upon the County Directors of Education to suspend the applicant’s ongoing elections conducted by itself claiming that the elections were not recognized by the 1st and 2nd Respondent and further directed that schools that had conducted elections previously carry out fresh elections to elect new officials of the School Parents Association.
 7. It was contended by the deponent that the Operational Guidelines for the Parents Associations and subsequent Email letter by 1st and 2nd Respondents Agent directing that fresh elections be held in all schools amounts to violation of the applicant’s Constitutional right of its members to elect office bearers of their choice to Parents Associations at the school level.
 8. To the deponent, the actions of the 1st and 2nd Respondents of directing school Parents Associations on how to hold elections have subjected its members to regulation and control and has violated the its constitutional right to freedom and association and freedom to conduct its own affairs without interference from any direction. To him, by reason of continued violation the applicant’s members’ right to elect officials of their choice at the pre primary, primary and secondary school level the forth coming National Elections will not reflect the will of the applicant’s members at the school level.
 9. It was averred that the election of the School Parents Associations as directed by the 1st and 2nd Respondents as per the Email letter to all County Directors of Education dated 16th June, 2014 are set to begin on or about 1st September 2014, whereas the elections of the applicant’s members at the school level as per the Notice dated 31st July 2014, and copied to the 1st and 2nd Respondent and their agents are set to commence from 12th September 2014 and end on 13th December 2014.
 10. The applicant, it was deposed, had already incurred expenses in the preparation towards its forthcoming school parents association elections and any other interference with to elect officials of their choice, conduct free and fair elections and will deny our members their Constitutional right to elect officials of their choice, conduct free and fair elections and will occasion the applicant substantial financial loss because it has already contracted a printer to print the ballot papers. Therefore unless restrained by orders of Permanent Injunction from interfering with the applicant’s rights to supervise and conduct School Parent Association Elections the 1st and 2nd Respondents will continue to violate its members right to hold free and fair elections.
 11. It was asserted that the 1st and 2nd Respondent are promoting, abetting and condoning illegal collections of funds from parents in public school by illegal entities such as the “Parents Teachers Associations” who are collecting funds without rendering accounts with regard to management and utilization of those funds thus violating the applicant’s Constitutional right to Good Governance, Integrity, Transparency and Accountability as enshrined in Article 10 of the Constitution of Kenya 2010 and Section 4(d) & (m) of the **Basic Education Act 2013**, Act No. 14 of 2013 under whose provisions the applicant is the only one are entitled through its agents

namely the School Parents Associations to discuss and recommend charges to be levied on pupils or parents and consequently safeguard, protect and account for the funds so collected. Unless granted orders prayed for in this application the 1st and 2nd Respondent will continue to violate the applicant's members' constitutional rights with impunity.

Respondent's Case

12. On behalf of the Respondents, the following grounds of opposition dated 5th September, 2014 were filed:

- 1. THAT the application is incompetent and an abuse of the court process**
- 2. THAT the petitioner is not a body that has been elected in accordance with the Act; the Petitioner is therefore not suited and has no *locus standi* to bring this application.**
- 3. THAT the petitioner will suffer any prejudice if the elections proceed at the school level as authorised in the email communication complained of**
- 4. THAT the membership of each School's Parent Association is definite as provided for in the Act and therefore there is no need for recruitment by the Petitioner who has in any event no mandate from the grassroots as required by the legislation.**
- 5. THAT the elections of School Parents Associations is a matter concerning a basic service provided by the National Government in accordance with established policy and hence is a matter falling within the jurisdiction of the Cabinet Secretary to regulate as befits public policy.**
- 6. THAT in any event the Petitioner has not demonstrated in any way how the guidelines that it impugns are contrary to the Constitution or the Basic Education Act 2013.**
- 7. THAT the 1st and 2nd Respondents do not in any way collect funds from parents and pupils.**
- 8. THAT it would be against the express provisions of legislation and public interest to allow the petitioner to collect and receive funds from parents and pupils due to the contents of ground number 2 hereinabove.**
- 9. THAT it would be against the express provisions of legislation and public interest to allow the levying of funds by the Kenya National Parents Association on the basis of ground number 2 hereinabove**
- 10. THAT it would be against the express provisions of legislation and public interest to have the petitioner control the school accounts as prayed in prayer number 7 of the application dated 25th August 2014 on the basis of ground number 2 hereinabove.**
- 11. THAT in an event the Government has taken measures to control illegal levies and inflated fees structures in schools as seen in the constitution of a task force in February 2014 on the subject.**

Applicant's Submissions

13. On behalf of the Applicant's it was submitted by **Mr Wamwayi**, learned counsel that the applicant was recognised by the former Minister for Education, the late **Mutula Kilonzo** who commended it for its work hence the applicant is legally in existence.

14. It was submitted that under Schedule 3 of the **Basic Education Act**, 2013 (hereinafter referred to as the Act) subsections 1 and 5 the applicant is an association of parents with pupils in school. Subsection 5 deals with establishment of National Parents Association which the applicant is and is asking for elections to be conducted at school level where the members of the applicant are. It was submitted that this was not the first such elections as the term of the previous office was coming to an end.
15. However the Respondents without assigning any reasons barred the said elections from taking place claiming that the applicant is not recognised by the Ministry and directed each school to start the process of electing new Parents Association Officials. It was submitted that the action by the Ministry would deny the members of the applicant an opportunity to elect officials of their choice which action is unconstitutional and contrary to freedom of association.
16. As no replying affidavit has been sworn by the Respondents, it was submitted that no reasons have been advanced why the said elections cannot be conducted. To the contrary the applicant stands to incur heavy losses if the same are not conducted taking into account the preparations which have been undertaken including the printing of ballot papers. The Respondents on the other hand will not suffer any prejudice if the said elections are conducted.

Respondents' Submissions

17. On behalf of the Respondents, it was submitted by Mr Njoroge learned Counsel that the Petitioner is not elected in accordance with the Act hence is not suitable to bring these proceedings. In his view the schedule provides for election by parents from the County at the school level.
18. The guidelines, it was submitted is meant to guide the public institutions on the provisions of such basic services and the manner of conducting the election. To him any person with a child in school becomes an automatic member of the parents association and therefore the right to elect their representatives.
19. In his view the Cabinet Secretary had the powers to issue the said guidelines. It was submitted that there is no guarantee that the openness provided in the guidelines will be achieved by the Petitioner.
20. Learned counsel averred that there was no indication of the specific provisions of the Constitutions which have been breached. As the guidelines are reasonable, the Court as urged not to interfere therewith as to do so would lead to chaos.

Determination

21. I have considered the foregoing.
22. Article 23(3)(c) of the Constitution provides that in any proceedings brought under Article 22, a court may grant appropriate relief, including a conservatory order. Proceedings under Article 22 of the Constitution deal with the enforcement of the Bill of Rights. Therefore a strict interpretation of Article 23(3)(c) shows that the reliefs specified thereunder are only available where a party is alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.
23. It has been held that in considering an application for conservatory orders, the court is not called upon to make any definite finding either of fact or law as that is the province of the court that will ultimately hear the petition. At this stage the applicant is only required to establish a *prima facie* case with a likelihood of success. The applicant must further demonstrate that unless the conservatory order is granted there is real danger which may be prejudicial to him. See **Centre for Rights, Education and Awareness (CREAW) & 7 others vs. The Hon. Attorney General**, Nairobi HC Pet. No 16/2011, **Muslims for Human Rights (MUHURI) & 2 others vs. The Attorney General & Judicial Service Commission**, Mombasa HCC Pet. No. 7 of 2011 and **V/D Berg Roses Kenya Limited & Another vs. Attorney General & 2 Others [2012] eKLR**.
24. The allegations herein bring the application within the provisions of Article 23(3)(c) of the Constitution.
25. In the Privy Council Case of **Attorney General vs. Sumair Bansraj (1985) 38 WIR 286 Braithwaite J.A.** expressed himself follows:

“Now to the formula. Both remedies of an interim injunction and an Interim declaration order are excluded by the State Liability and Proceedings Act, as applied by Section 14 (2) and (3) of the Constitution and also by high judicial authority. The only judicial remedy is that of what has become to be known as the “Conservatory Order” in the strictest sense of that term. The order would direct both parties to undertake that no action of any kind to enforce their respective right will be taken until the substantive originating motion has been determined; that the status quo of the subject matter will remain intact. The order would not then be in the nature of an injunction, ... but on the other hand it would be well within the competence and jurisdiction of the High Court to “give such directions as it may consider appropriate for the purpose of securing the enforcement of ... the provisions” of the Constitution...In the exercise of its discretion given under Section 14(2) of the Constitution the High Court would be required to deal expeditiously with the application, inter partes, and not ex parte and to set down the substantive motion for hearing within a week at most of the interim Conservatory Order. The substantive motion must be heard forthwith and the rights of the parties determined. In the event of an appeal priority must be given to the hearing of the appeal. I have suggested this formula because in my opinion the interpretation of the word in Section 14 (2) “subject to subsection (3) and the enactment of Section 14(3) in the 1976 Constitution must have...the effect without a doubt of taking away from the individual the redress of injunction which was open to him under the 1962 Constitution. On the other hand, however, the state has its rights too...The critical factor in cases of this kind is the exercise of the discretion of the judge who must “hold the scales of justice evenly not only between man and man but also between man and state.”

26. The aforesaid principles were adopted by the High Court of the Republic of Trinidad and Tobago in the case of Steve Furgoson & Another vs. The A.G. & Another Claim No. CV 2008 – 00639 – Trinidad & Tobago. The Honourable Justice V. Kokaram in adopting the reasoning in the case of *Bansraj* above stated:

“I have considered the principles of *East Coast Drilling –V- Petroleum Company of Trinidad And Tobago Limited (2000) 58 WIR 351* and I adopt the reasoning of BANSRAJ and consider it appropriate in this case to grant a Conservatory Order against the extradition of the claimants pending the determination of this motion. The Constitutional challenge to the Act made in this case is on its face a serious one. The Defendant has not submitted that the Constitutional claim is unarguable. The Claimants contends that the Act is in breach of our fundamental law and the international obligations undertaken were inconsistent with supreme law. It would be wrong in my view to extradite the claimants while this issue is pending in effect and which will render the matter of the Constitutionality of the legislation academic.”

27. Back home, *Musinga, J* (as he then was) in Petition No. 16 of 2011, Nairobi – Centre For Rights Education and Awareness (CREAW) & 7 Others stated that:

“...It is important to point out that the arguments that were advanced by Counsel and that I will take into account in this ruling relate to the prayer for a Conservatory Order in terms of prayer 3 of the Petitioner’s Application and not the Petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a Conservatory Order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the Conservatory Order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution.”

28. In The Centre for Human Rights and Democracy & Others vs. The Judges and Magistrates Vetting Board & Others Eldoret Petition No. 11 of 2012, it was held by a majority as follows:

“In our view where a legal wrong or a legal injury is caused to a person or to a determinate class of persons by reason of violation of any Constitutional or legal right or any burden is imposed in the contravention of any Constitutional or legal provision or without the

authority of the law or any such legal wrong or injury is threatened, the High Court has powers to grant appropriate reliefs so that the aggrieved party is not rendered, helpless or hapless in the eyes of the wrong visited or about to be visited upon him or her. This is meant to give an interim protection in order not to expose others to preventable perils or risks by inaction or omission.”

29. In **Judicial Service Commission vs. Speaker of the National Assembly & Another Petition No. 518 of 2013**, this Court expressed itself as follows:

“Conservatory orders in my view are not ordinary civil law remedies but are remedies provided for under the Constitution, the Supreme law of the land. They are not remedies between one individual as against another but are meant to keep the subject matter of the dispute *in situ*. Therefore such remedies are remedies *in rem* as opposed to remedies *in personam*. In other words they are remedies in respect of a particular state of affairs as opposed to injunctive orders which may only attach to a particular person.”

30. Whereas the Petitioner has given evidence on oath in support of the application, the Respondents have not filed any replying affidavit. Consequently, the Petitioner’s averment remain wholly uncontroverted and the averment made from the bar that the Petitioner is not recognised by the Ministry in light of the letter dated 21st February, 2013 in which the then Minister for Education granted to the Petitioner authority to formalise the establishment of school parents associations, sub county parents associations and national parents association. Without any reasons given why the Ministry has suddenly changed this view, the Court cannot at this stage say that the Petitioner’s case is frivolous. I am therefore satisfied that the Petitioner has established a prima facie case for the purposes of the grant of a conservatory order.

31. With respect to the prejudice which the Petitioner is likely to suffer if the conservatory order sought is not granted, it is the Petitioner’s case which again is not controverted that it has incurred huge expenses in the preparation for the said elections.

32. In the premises I am satisfied that prayer 2 of the Notice of Motion dated 25th August, 2014 is merited.

Order

33. Accordingly I hereby grant a temporary injunction restraining the 1st and 2nd Respondents either by themselves, their Servants, Agents or Persons acting under their authority from suspending, nullifying, presiding over, preparing to conduct, constituting parents association committees at the school level and or in any way whatsoever from interfering with Applicant’s right to Conduct and Supervise elections of the School Parents Associations, Sub-County Parents Association, County Parents Associations and National Parents Association pending the hearing and determination of this Petition.

34. The costs of the application will be in the cause.

Dated at Nairobi this 17th day of September 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wamwayi for the Applicant

Mr Ojwang for Mr Njoroge for the Respondent

Cc Patricia